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No. 84-6807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MILLIE R. LEE,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari
To The Appellate Court of Illinois
Fifth Judicial District

BRIEF FOR PETITIONER

DAN W. EVERS
Assistant Defender
RANDY E. BLUE*
Deputy Defender
Office of the State
Appellate Defender
Fifth Judicial District
Route 15 East
P.O. Box 2430
Mt. Vernon, Illinois 62864
(618) 244-3466
Counsel for Petitioner
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED FOR REVIEW

Whether the petitioner's sixth and fourteenth amendment right to confront the witnesses against her was violated by the trial court's consideration of the inculpatory confession of her nontestifying co-defendant as substantive evidence of her guilt?

TABLE OF CONTENTS

	Page
OPINIONS AND JUDGMENTS BELOW	1
STATEMENT OF JURISDICTIONAL GROUNDS	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT: THE PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HER WAS VIOLATED BY THE TRIAL COURT'S CONSIDERATION OF THE NONTESTIFYING CO-DEFENDANT'S CONFESSION AS SUBSTANTIVE EVIDENCE IN DETERMINING PETITIONER'S GUILT	7
CONCLUSION	19

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS: Page

U.S. Const. amend. VI 7, 8, 13, 14, 18
U.S. Const. amend. XIV 7, 13

STATUTES:

Ill. Rev. Stat., 1983, Ch. 38, § 9-2 10
Ill. Rev. Stat., 1983, Ch. 38, § 5-2(c) 9

CASES:

Anderson v. *United States*, 417 U.S. 211 (1974) 8
Berger v. *California*, 393 U.S. 314 (1969) 7
Blumenthal v. *United States*, 332 U.S. 539 (1947) 8
Bruton v. *United States*, 391 U.S. 123 (1968) 10, 11, 12, 13, 15, 17, 18
California v. *Green*, 399 U.S. 149 (1970) 18
Chambers v. *Mississippi*, 410 U.S. 284 (1973) 7
Chapman v. *California*, 386 U.S. 18 (1967) 16, 17
Cockrell v. *Oberhauser*, 413 F.2d 256 (9th Cir. 1969) 11
Davis v. *Alaska*, 415 U.S. 308 (1974) 8
Delli Paoli v. *United States*, 352 U.S. 232 (1957) 11, 12
Douglas v. *Alabama*, 380 U.S. 415 (1965) 8
Dutton v. *Evans*, 400 U.S. 74 (1970) 18
Fahy v. *Connecticut*, 375 U.S. 85 (1963) 17
Linkletter v. *Walker*, 381 U.S. 618 (1965) 10
Parker v. *Randolph*, 442 U.S. 62 (1979) 13, 14, 16
People v. *Bassett*, 56 Ill. 2d 285, 307 N.E.2d 359 (1974) 12, 13
People v. *Malcom*, 14 Ill. App. 3d 378, 302 N.E.2d 352 (1st Dist. 1973) 9
People v. *McNeal*, 56 Ill. App. 3d 132, 371 N.E.2d 926 (1st Dist. 1977) 11
People v. *Pettis*, 104 Ill. App. 3d 275, 432 N.E.2d 935 (1st Dist. 1982) 11
People v. *Reichert*, 352 Ill. 358, 185 N.E.585 (1933) 14
People v. *Rosochacki*, 41 Ill. 2d 483, 244 N.E.2d 136 (1969) 12, 13

Table of Authorities Continued

	Page
People v. *Simpson*, 39 Ill. App. 3d 318, 349 N.E.2d 441 (4th Dist. 1976)	12
People v. *Tyner*, 30 Ill. 2d 101, 195 N.E.2d 675 (1964)	11
Pointer v. *Texas*, 380 U.S. 400 (1965)	7
Roberts v. *Russell*, 392 U.S. 293 (1968)	10
United States v. *Longee*, 603 F.2d 1342 (9th Cir. 1979)	11, 14, 15
MISCELLANEOUS:	
5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)	8
Fed. R. Evid. 801(d)(2)(E)	12

OPINIONS AND JUDGMENTS BELOW

People v. *Lee*, No. 61304 (Ill. S.Ct. Order denying leave to appeal April 2, 1985).

People v. *Lee*, No. 5-82-539 (Ill. App. Ct. 5th Dist. December 7, 1984).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner invoked the jurisdiction of This Honorable Court under the provisions of 28 U.S.C. § 1257(3) and sought a writ of certiorari based on a "right . . . claimed under the Constitution." Her petition for the writ was filed within sixty days of the Illinois Supreme Court's Order which denied her timely petition for leave to appeal the judgment of the Appellate Court of Illinois, Fifth Judicial District, as mandated by Rule 20.1 of This Honorable Court.

CONSTITUTIONAL PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

* * *

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

> person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

On April 16, 1982, a bill of indictment was returned by the grand jury of St. Clair County, Illinois, charging the petitioner Millie Lee and Edwin Thomas with the murders of Mattie Darden and Odessa Harris. (J.A. 2, 3) Petitioner and Edwin Thomas were jointly tried before the bench, without a jury, in the St. Clair County Circuit Court on July 7-8, 1982.

On February 13, 1982, a fireman who had responded to the report of a fire, discovered a body in the closet of apartment 35B of the Roosevelt Homes in East St. Louis, Illinois. He also discovered a can of charcoal lighter fluid on the floor by the closet. (R.13-16) The body had been burned and had a number of stab wounds. (R.19-21) A purse containing the identification of Odessa Donahue was found by the police approximately one hundred feet south of apartment 35B. (R.26,140,166) Police began a search to locate Odessa Donahue. (R.166-67) Their investigation led them to the petitioner's apartment, apartment 33B in the Roosevelt Homes. (R.167-70)

On February 15, 1982, several East St. Louis detectives went to the petitioner's apartment. (R.100,170) They were invited into the apartment and noticed that furniture had been moved around, walls had been painted, and a mop and bucket were visible. (R.102,173) The petitioner informed the police that she did not know the whereabouts of Odessa Donahue, also known as Odessa Harris. (R.102,172) The petitioner stated that the apartment was Mattie Darden's, her aunt, who was out of town

visiting relatives. Petitioner also stated that she was related to Odessa (Donahue) Harris. (R.103,172) The petitioner agreed to go to the East St. Louis Police Department in order to determine whether she could identify the body discovered in the closet. (R.103,174)

At the East St. Louis Police Department the petitioner was shown several photographs of the body. A detective observed that the petitioner was crying while she was viewing the photographs of the body. He advised petitioner of her rights under *Miranda*. (R.104,175) The petitioner thereafter gave a number of conflicting accounts concerning the whereabouts of Odessa Harris and Mattie Darden. (R.108,178) The petitioner eventually admitted that the body in the closet was that of Mattie Darden and that Odessa Harris was also dead. She admitted that she was involved in the death of Mattie Darden, that Edwin Thomas also was involved, and that Edwin Thomas had killed Odessa Harris. (R.109,179) The police placed the petitioner under arrest, read the petitioner her *Miranda* rights again, and obtained two written statements from her. (R.179-80)

Petitioner's statements related that on Thursday, February 11, 1982, she was with her boyfriend Edwin Thomas at the apartment which she shared with Mattie Darden. Mattie Darden returned to the apartment with Odessa Harris. At one point the petitioner was in the kitchen arguing with Odessa Harris. Mattie Darden was in her bedroom. As Odessa Harris left the kitchen and went into the living room, Edwin Thomas stabbed Odessa Harris. Odessa Harris called for help. The petitioner ran into Mattie Darden's bedroom. Mattie Darden was in the bedroom with a knife and swung the knife at the petitioner. The petitioner ran back into the kitchen, got a knife, and went into the bedroom where she stabbed

Mattie Darden a number of times. The petitioner obtained an iron skillet, and both she and Edwin Thomas struck Mattie Darden with it. They then put Odessa Harris' body in a trunk and put the trunk in an alley behind the apartment. They carried Mattie Darden's body wrapped in a couple of blankets to apartment 35B and placed it in the living room closet.

The petitioner purchased a can of charcoal lighter fluid. Approximately midnight, Edwin Thomas poured lighter fluid on the body of Odessa Harris and set it on fire. On Saturday, February 13, 1982, Edwin Thomas went back to apartment 35B and set on fire the body of Mattie Darden. (J.A. 4-15)

Edwin Thomas was arrested, and he also gave a written statement. (R.113-15,135) However, Mr. Thomas' statement related that the petitioner and he had discussed on prior occasions killing Mattie Darden due to severe personality conflicts between the petitioner, Edwin Thomas, and Mattie Darden. Mr. Thomas' statement also detailed that he and petitioner discussed killing Mattie Darden the evening of February 11, 1982, but that they wanted Odessa Harris to leave. Odessa Harris did not leave and they were forced to kill her also. Mr. Thomas related that he had the petitioner lure Odessa Harris into the kitchen, and he attacked Odessa Harris with a knife. He stabbed her a number of times on the floor of the kitchen, eventually killing her. The petitioner then went into Mattie Darden's bedroom and stabbed Ms. Darden. They then disposed of the bodies as the petitioner had described in her statement. (J.A. 16-24)

The police recovered some charred human bones from the trash can behind the apartment. (R.78-82,181) Dr. William A. Murphy, a specialist in radiology, testified that he was able to determine that the bone fragments were

those of Odessa (Donahue) Harris. (R.153-57) An autopsy determined that Mattie Darden died due to multiple stab wounds to the chest and blunt trauma to the head. (R.77)

Petitioner put forth as her defense that she did not have any prior knowledge that Mr. Thomas was going to kill Odessa Harris, nor did she participate in any way in the killing of Ms. Harris. Consequently, she argued she was not guilty of Ms. Harris' murder. She also argued that she could only be found guilty of the lesser offense of voluntary manslaughter in relation to the death of Mattie Darden, based upon either her unreasonable belief that her act of stabbing Mattie Darden constituted self-defense or that the act was the result of a sudden and intense passion resulting from serious provocation. She contended that there was no prior plan made between her and Mr. Thomas to kill Ms. Darden and that her statement indicated that petitioner was confronted by Ms. Darden holding a knife. (R.232-34)

The trial court found petitioner and Edwin Thomas guilty of the murder of Odessa Harris and Mattie Darden. (R.239) The trial court stated:

> As to the contention of the defendant, particularly the defendant Lee as stated by her attorney, that Voluntary Manslaughter which is [sic] resulted from a sudden and intense passion, that is disputed by the statement of her co-defendant, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking, as stated by Mr. Hudlin, she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, according to his own confession, the defendant [Edwin Thomas] took a knife, took it back to the chair where he kept it, and awaited the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could [sic] come out.

> Now that isn't sudden and intense passion. There was no self-defense that even entered into a struggle between the defendant Lee and her aunt in the bedroom. She went in there, and expected the aunt to have a gun, the aunt didn't. She had a knife, however. And she stabbed her, then they both acted together. (R.238)

On September 7, 1982, the petitioner was sentenced for the murder of Odessa Harris to a term of forty years incarceration. For the murder of Mattie Darden the petitioner was sentenced to a term of natural life imprisonment. (J.A. 28)

On appeal to the Appellate Court of Illinois petitioner contended, *inter alia*, that her sixth and fourteenth amendment right to confront the witnesses against her was violated by the trial court's consideration of Mr. Thomas' confession against her. The petitioner contended that under *Bruton* v. *United States*, 391 U.S. 123 (1968), the trial court improperly rejected her defense based upon Mr. Thomas' statement. On December 7, 1984, the Appellate Court of Illinois, Fifth Judicial District, in an unpublished order, rejected her argument. The Appellate Court held that the statements made by petitioner and Mr. Thomas were "interlocking confessions", and therefore did not fall within the *Bruton* rule. Petitioner filed a timely petition for leave to appeal to the Illinois Supreme Court, which was denied on April 2, 1985. This Honorable Court granted a writ of certiorari on July 1, 1985.

SUMMARY OF ARGUMENT

In finding petitioner guilty of murder, the trial court relied upon the nontestifying co-defendant's confession to establish the defendant's prior intent to commit the offense, thus negating her affirmative defense. The court's consideration of the co-defendant's confession

against petitioner violated her sixth and fourteenth amendment right to confront the witnesses against her, since the co-defendant did not testify at trial and petitioner was unable to cross-examine him. The Appellate Court of Illinois' decision that petitioner's and Mr. Thomas' statements are "interlocking confessions" is erroneous. The statements are not "interlocking" in the crucial area of intent to kill.

ARGUMENT

THE PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HER WAS VIOLATED BY THE TRIAL COURT'S CONSIDERATION OF THE NONTESTIFYING CO-DEFENDANT'S CONFESSION AS SUBSTANTIVE EVIDENCE IN DETERMINING PETITIONER'S GUILT.

Among the paramount rights afforded by the Constitution of the United States is the right of an accused to require that the accusers appear before the trier of fact and subject their accusations against him to cross-examination. The sixth amendment of the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

U.S. Const. amend. VI. This Honorable Court held in *Pointer* v. *Texas*, 380 U.S. 400 (1965), that the sixth amendment right to confront the witnesses against a defendant is applicable to the states through the fourteenth amendment. The denial of this right "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973), quoting *Berger* v. *California*, 393 U.S. 314, 315 (1969).

An essential element of a fair trial is that the trier of fact consider only relevant and competent evidence in deter-

mining the facts in a case and reaching a verdict against an accused. *See Blumenthal* v. *United States*, 332 U.S. 539 (1947). The sixth amendment right to confront witnesses is one of those enumerated rights of the Constitution available to everyone, without regard to guilt or innocence, to ensure a fair trial. The confrontation clause of the sixth amendment is designed to maintain the integrity of the fact-finding process and procedure at trial. This Honorable Court has noted on numerous occasions that the sixth amendment right of confrontation would be meaningless without the opportunity for cross-examination of the accusers. *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Anderson* v. *United States*, 417 U.S. 211 (1974); *Douglas* v. *Alabama*, 380 U.S. 415 (1965). This Honorable Court in *Davis* v. *Alaska*, stated: "Confrontation means more than being allowed to confront the witness physically. . . . 'The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*'." 415 U.S. at 315-16, citing Professor Wigmore at 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940).

In orally pronouncing petitioner guilty of both murders, the trial court, sitting as the trier of fact, stated in response to petitioner's defense:

> As to the contention of the defendant, particularly the *defendant Lee* as stated by her attorney, that Voluntary Manslaughter which is [sic] resulted from a sudden and intense passion, that is *disputed by the statement of her co-defendant*, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking, as stated by Mr. Hudlin, she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, *according to his own confession, the defendant [Edwin Thomas]* took a knife, took it back to the chair where he kept it, and awaited

> the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could [sic] come out. *Now that isn't sudden and intense passion. There was no self-defense* that even entered into a struggle between the defendant Lee and her aunt in the bedroom. She went in there, and expected the aunt to have a gun, the aunt didn't. She had a knife, however. And she stabbed her, then they both acted together. (R.238) (emphasis added)

(J.A. 25) The co-defendant did not testify at their joint trial. Petitioner was therefore not able to subject his accusations to cross-examination and was thereby denied her right of confrontation.

Petitioner's defense at trial was two pronged. First, she argued that she did not plan with Mr. Thomas to kill anyone. She argued that her statement indicated that she did not have any prior knowledge that Ms. Harris would be killed by Mr. Thomas; that she did not participate or aid Mr. Thomas in any manner in killing Ms. Harris. Therefore, she could not be found guilty of the murder of Ms. Harris as a direct participant or as being accountable for the actions of Mr. Thomas.[1] Secondly, she argued that her statement indicated that after Mr. Thomas stabbed Ms. Harris she ran into Ms. Darden's bedroom and was confronted by Ms. Darden with a knife. She obtained a knife

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[1] The Illinois accountability statute provides:

> A person is legally accountable for the conduct of another when:
>
> * * *
>
> (c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

Ill. Rev. Stat., 1983, Ch. 38, § 5-2(c). Under Illinois law a person cannot be held accountable for an offense for actions taken by the person after the offense has been completed. *People* v. *Malcolm*, 14 Ill. App. 3d 378, 302 N.E.2d 352 (1st Dist. 1973).

and stabbed Ms. Darden. She concluded that she could not be found guilty of murder, but only of the lesser offense of voluntary manslaughter.[2] Voluntary manslaughter could be based either on the unreasonable belief in the need for her actions in self-defense or on the court's finding that she was acting under a sudden and intense passion resulting from serious provocation. (R.232-34)

In *Bruton* v. *United States*, 391 U.S. 123 (1968), This Honorable Court held that the right of confrontation, the right of cross-examination, is violated at a joint jury trial when a co-defendant's confession inculpating the defendant is admitted into evidence and the co-defendant does not testify. In *Bruton*, Your Honors established that there is too great a danger that the jury cannot follow the instructions of the court not to consider a co-defendant's confession against the defendant.[3] The rule had pre-

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[2] The Illinois voluntary manslaughter statute states:

> A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed, or
>
> (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.
>
> Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.
>
> (b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

Ill. Rev. Stat., 1983, Ch. 38, § 9-2.

[3] See *Roberts* v. *Russell*, 392 U.S. 293 (1968), applying *Bruton* to the states because "the error 'went to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination' of his guilt or innocence." 392 U.S. at 294, quoting *Linkletter* v. *Walker*, 381 U.S. 618, 639 n.20 (1965).

viously been that a proper jury instruction which limited the use of the co-defendant's confession strictly against the co-defendant was proper. 391 U.S. at 135-36; *See Delli Paoli* v. *United States*, 352 U.S. 232 (1957). While Justice White dissented from the disposition made by The Court in overruling *Delli Paoli* in *Bruton*, he agreed that the hearsay statement of the co-defendant was not admissible against Bruton, stating: "As to him it was inadmissible hearsay, a presumptively unreliable out-of-court statement of a nonparty who was not a witness subject to cross-examination. Admitting [the co-defendant's] confession against Bruton would require a new trial unless the error was harmless." 391 U.S. at 138.

Normally a *Bruton* type problem is not presented in a trial before the bench without a jury. Where the record is silent, the court is presumed to know the law and not consider a co-defendant's confession against another defendant, but only consider the competent evidence against each defendant. *Cockrell* v. *Oberhauser*, 413 F.2d 256, 258 (9th Cir. 1969), *cert. denied*, 397 U.S. 994. *See also People* v. *McNeal*, 56 Ill. App. 3d 132, 371 N.E.2d 926, 931-32 (1st Dist. 1977). However, this record is not silent and it is clear from this record that the trial court did consider such improper evidence against the petitioner; thus the presumption fails and a deprivation of the right to confront has occurred. *United States* v. *Longee*, 603 F.2d 1342, 1345 (9th Cir. 1979). *See also People* v. *Pettis*, 104 Ill. App. 3d 275, 432 N.E.2d 935 (1st Dist. 1982). The co-defendant's confession is hearsay and cannot be used as substantive evidence against the petitioner. *People* v. *Tyner*, 30 Ill. 2d 101, 195 N.E.2d 675 (1964). This Honorable Court noted in *Bruton* that there is no recognized exception to the hearsay rule permitting the trier of fact to consider a nontestifying co-defendant's confession against another defendant. 391 U.S. at 128 n.3. The co-

defendant's confession cannot be used against the petitioner on the theory that it is the statement of a co-conspirator, since it is merely a narrative of Mr. Thomas' version of what occurred, not a statement in furtherance of a conspiracy. *Delli Paoli* v. *United States*, 352 U.S. 232 (1957); *People* v. *Simpson*, 39 Ill. App. 3d 318, 349 N.E.2d 441 (4th Dist. 1976). *See* Fed. R. Evid. 801(d)(2)(E).

On appeal before the Appellate Court of Illinois, Fifth Judicial District, the State of Illinois conceded that the trial court considered the co-defendant's confession as substantive evidence against the petitioner. (Brief for Plaintiff-Appellee at 3,8) Before This Honorable Court in its brief in opposition to her petition for a writ of certiorari the State again conceded that the trial court erroneously considered Mr. Thomas' confession against the petitioner. (Respondent's brief in opposition at 4-5) The Appellate Court of Illinois in its decision agreed that the trial court considered the co-defendant's confession against the petitioner (J.A. 34), however The Court rejected petitioner's contention that her sixth and fourteenth amendment rights were violated. (J.A. 34) The Court stated:

> It is well settled that a substantial difference exists between the *Bruton* rule and the interlocking confession situation. In the former situation, a jury hears only the co-defendant's statement incriminating the defendant who has himself made no admissions whatsoever, whereas in the latter situation, the jury hears a co-defendant's statement incriminating the defendant who had himself made similar inculpatory admissions. When the interlocking admissions are inculpatory, the admission of co-defendant's incriminating statement against defendant does not fall within the *Bruton* rule. Hence defendant's first argument fails. *People* v. *Bassett* (1974), 56 Ill. 2d 285, 307 N.E.2d 359, 365; *People* v.

Rosochacki (1969), 41 Ill. 2d 483, 244 N.E.2d 136, 141-42.

(J.A. 34)

The Appellate Court of Illinois' reliance upon *Bassett* and *Rosochacki* is a fundamental misapplication of the law. In *People* v. *Rosochacki*, 41 Ill. 2d 483, 244 N.E.2d 136 (1969), the Illinois Supreme Court held that where a nontestifying co-defendant's extrajudicial statement is admitted as evidence of the declarant's guilt at a joint jury trial in violation of the *Bruton* rule, the prejudice inherent in such evidence is diminished if the defendant has himself made a similar statement. For this reason, admission of a nontestifying co-defendant's interlocking confession can under some circumstances be harmless error. This was the position of Justices Brennan, Marhsall, Blackmun, and Stevens in *Parker* v. *Randolph*, 442 U.S. 62 (1979). In *People* v. *Bassett*, 56 Ill. 2d 285, 307 N.E.2d 359 (1974), the Illinois Supreme Court apparently adopted, *sub silentio*, the position that "interlocking confessions" do not fall within the *Bruton* rule. This was the position taken by Chief Justice Burger, and Justices Stewart, White, and Rehnquist in *Parker*.

In *Parker* This Honorable Court reviewed the order of the federal district court granting *habeas corpus* relief to three nontestifying co-defendants who had made interlocking confessions which were admitted at their joint jury trial. Chief Justice Burger and Justices Stewart, White, and Rehnquist expressed the view that the admission of interlocking confessions of nontestifying co-defendants *with proper limiting instructions* conforms to the requirements of the sixth and fourteenth amendments. Justice Rehnquist, writing for the four justices, reasoned that:

> The right protected by *Bruton*—the "constitutional right of cross-examination," id., at 137—has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence. Successfully impeaching a co-defendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury *unchallenged*.

Parker v. *Randolph*, 442 U.S. at 73 (emphasis added).

Justice Blackmun concurred in the results reached in the plurality opinion but disagreed with the view that there was *per se* no violation of the sixth amendment right of confrontation when the defendant has made a statement similar to that of his nontestifying co-defendent. Justice Blackmun expressed the view that admission of the nontestifying co-defendant's statement was error, that the degree of prejudice inherent in the error should be examined on a case-by-case basis, and that reversal was not required where the error was harmless beyond a reasonable doubt. *Parker* v. *Randolph*, 442 U.S. at 77-81.

Justice Stevens writing for the three dissenting justices reasoned that the plurality incorrectly assumed "that all unchallenged confessions by a defendant are equally reliable." *Parker* v. *Randolph*, 442 U.S. 84. Justice Stevens pointed out that in some cases the defendant's inculpatory statement may be ambiguous, incomplete or the result of coercive influences, and thus not sufficiently convincing to negate the prejudice inherent in violating the constitutional right to cross-examine the co-defendant. *Parker* v. *Randolph*, 442 U.S. at 84-86.

As the Illinois Supreme Court stated in *People* v. *Reichert*, 352 Ill. 358, 185 N.E. 585, 586 (1933), "[c]ourts have no more right than a jury to convict the accused on incompetent evidence." In *United States* v. *Longee*, 603 F.2d

1342 (9th Cir. 1979), the United States Court of Appeals for the Ninth Circuit recognized this principle and held that a *Bruton* problem may be reversible error in a trial before the bench without a jury. The Court in *Longee* stated:

> The fact that the defendants were tried to the court rather than to a jury does not eliminate the error. The disregard of incriminating evidence as against only one defendant in a joint trial has been termed "a mental gymnastic which is beyond, not only [the jury's] powers, but anybody's else." *Nash* v. *United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (L. Hand, J.), *quoted in Bruton*, 391 U.S. at 132 n.8, 88 S.Ct. at 1626. It is for this reason that the use of a limiting instruction in a jury trial is inadequate to cure the error. *Bruton*, 391 U.S. at 135-37, 88 S.Ct. at 1627-29. Here, there was neither an objection by defense counsel nor an indication in the record that the district judge attempted to disregard Chaser's statements as evidence against Longee. Indeed, he specifically referred to them in his findings.

603 F.2d at 1345.

While the petitioner's and the co-defendant's statements contain many similarities, crucial differences do exist. Those crucial differences were the very points relied upon by the trial court in rejecting petitioner's defense at trial. The reasoning of the Appellate Court fails when it stated:

> Although the judge did consider co-defendant Thomas' confession, it is evident from the record that he considered the defendant's confession as well. Defendant's statement reveals her attack on Darden was not the result of self-defense, for after she had left Darden's bedroom originally there was no need for her to return to the bedroom. Furthermore, defendant alluded to a plan in her own confession,

where she stated:

Lee: Me, and Edwin [sic] had talked about stopping aunt Mattie from harassing me before.* * *

(J.A. 34). The Court incorrectly assumed that this showed a plan on the part of petitioner to murder Mattie Darden. Petitioner's statement does not show such an intent to kill, nor a plan to murder Mattie Darden. The Court ignored the continuation of petitioner's statement when she told the police:

> Edwin used to get mad when my aunt would talk about me and that he couldn't take much more of what my auntie was doing, that [sic] when he began talking about doing something to aunt Beetty [sic], but *he never said what.* (emphasis added).

(J.A. 12) No prior plan between petitioner and the co-defendant can be found in petitioner's statement.

Justice Stevens' concern in *Parker* that the defendant's statement may be ambiguous or incomplete is present in this case. Petitioner's statement is incomplete in that it is not a confession to murder; it demonstrates neither an intent to kill nor premeditation on her part. It is incomplete in that the trial court had to utilize the co-defendant's confession to impute to petitioner a prior plan to commit murder. On the other hand, Justice Rehnquist's theory of harmlessness is not present. Contrary to the assertion in *Parker* that cross-examination and impeachment of the co-defendant's statement would "likely yield small advantage to the defendant," impeachment of the co-defendant's confession as to the existence of a plan and intention to kill would reap great dividends for the petitioner here.

The error in this case cannot be considered harmless error beyond a reasonable doubt as This Honorable Court enunciated that standard in *Chapman* v. *California*, 386

U.S. 18 (1967), and *Fahy* v. *Connecticut*, 375 U.S. 85 (1963). In *Fahy* The Court stated: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87. This Honorable Court adhered to this statement in formulating the harmless beyond a reasonable doubt standard of *Chapman*. 386 U.S. at 23-24. There is not just the "reasonable possibility that" co-defendant Thomas' confession "might have contributed to the conviction" of the petitioner, but the certainty that the co-defendant's confession contributed to her conviction. The trier of fact stated that the co-defendant's confession was a contributing factor to her conviction. A determination that the constitutional error in this case was harmless beyond a reasonable doubt would be inappropriate.

This Honorable Court in *Bruton* was concerned that:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the confrontation clause was directed.

391 U.S. at 135-36. The Court in *Bruton* acknowledged "the impossibility of determining whether in fact the jury did or did not ignore [the co-defendant's] statement inculpating [Bruton] in determining [Bruton's] guilt." 391 U.S. at 136.

In this case we do not have just the danger that the trier of fact will not follow the law as in *Bruton*, but the trial court's own statement that it was not following the law. In his concurrence in *California* v. *Green*, 399 U.S. 149, 172-89 (1970), Justice Harlan traced the history of the confrontation clause of the sixth amendment and adopted the view that it was a constitutional assurance that a fair defense could be made to criminal accusations. Justice Harlan stated: "From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses." 399 U.S. at 179. Justice Harlan also stated that "the paradigmatic evil the Confrontation Clause was aimed at [was] trial by affidavit. . . ." *Dutton* v. *Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring). Such evils are present in this case. Petitioner was not permitted to make a fair defense; she was unable to cross-examine the co-defendant since he did not testify at trial, and thereby became an absentee witness. The paradigmatic evil of trial by affidavit is presented in this case in a fashion more detrimental to a fair trial, since the co-defendant's statement was unsworn hearsay, not a sworn affidavit under the penalties of perjury. The trial court's consideration of Mr. Thomas' confession against petitioner is a flagrant abuse that the sixth amendment was designed to prohibit.

Petitioner respectfully requests This Honorable Court to reverse the judgments of the Appellate Court of Illi-

nois, Fifth Judicial District, and of the Circuit Court of St. Clair County, and remand the cause for a new trial.

CONCLUSION

The petitioner's right to confront the witnesses against her was violated by the court's consideration against her of her nontestifying co-defendant's confession. This Honorable Court's decisions in *Bruton* v. *United States* and *Parker* v. *Randolph* demonstrate that the Appellate Court of Illinois, Fifth Judicial District, erroneously determined that no constitutional violation occurred. Therefore, the petitioner prays that This Honorable Court reverse the judgments of the Appellate Court of Illinois, Fifth Judicial District and the Circuit Court of St. Clair County, and grant the petitioner a new trial.

Respectfully submitted,

DAN W. EVERS
Assistant Defender
RANDY E. BLUE*
Deputy Defender
Office of the State
Appellate Defender
Fifth Judicial District
Route 15 East
P.O. Box 2430
Mt. Vernon, Illinois 62864
(618) 244-3466
Counsel for Petitioner
**Counsel of Record*